from Taiwan and that appellant was to arrange for the purchase and delivery of the brushes from Taiwan and respondents' share was 2,420 brushes. Respondents paid $4,320 for the brushes. Appellant admitted that some brushes were damaged or broken but not to the extent as alleged by respondents.

The learned Senior President of Sessions Court was clearly aware of the conflicting evidence between the two parties. She had the opportunity of seeing and hearing the witnesses and would be in a better position to assess their credibility. It is conceded even by counsel for respondents that an appellate court should not interfere with the finding of facts by the lower court. However, he contended that where the lower court made inferences from facts then the appellate court can interfere. He submitted that whether there was a contract or not the relationship between the parties is a question of law. This is to be inferred from the facts found at the trial. Respondents cited *Benmax* v. *Austin Motor Co. Ltd.*[1] The headnotes read: —

"An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge."

The learned Senior President of Sessions Court also pointed out the parties were businessmen whose main concern was to see that they made as much profit as they could from their transactions. In this case the fact was that both were paying $1.80 per brush and the appellant was not making any profit and asked respondents to buy the brushes out of friendship. The result is that the learned Senior President of the Sessions Court found that no relationship of buyer and seller existed between the parties. The claim was therefore dismissed.

The grounds of judgment were not available. The notes of proceedings are not sufficient to fathom into the reasoning of the learned judge. On the question of principles which an appellate court should act in reviewing finding of fact, see *Chow Yee Wah & Anor.* v. *Choo Ah Pat.*[2] The absence of grounds make it difficult to know the reasons for the learned judge in upsetting the finding of facts by the lower court.

It may be useful to refer to *Watt* v. *Thomas*[3] where Lord Thankerton laid down the following principles: —

"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The learned Senior President of Sessions Court could easily have taken an easy course instead of going into details regarding the evidence. She could have said that the evidence by each party was very unsatisfactory making it difficult to say which side she was to believe. The onus rested upon the plaintiffs (respondents in this case) but they failed to discharge that onus so the claim was dismissed. Instead, she tried to sort out the truth and do justice to the parties. She had made specific finding of facts. We have found no misdirection. The learned judge should not have disturbed the finding of facts. Accordingly, we allowed the appeal with costs both here and the court below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Allen & Gledhill.*

WEE KEE PUAN v. OVERSEA-CHINESE BANKING CORPORATION LTD.

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & July 30, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 57 of 1980]

Banking — Overdraft facility given by bank — Account dormant — Claim for repayment — Claim statute-barred — Letter acknowledging loan not pleaded — Limitation Ordinance, 1953, s. 6.

Limitation — Claim Statute barred — Letter of acknowledgement not pleaded — Limitation Ordinance, 1953, s. 6.

In this case the appellant had been granted an overdraft facility in 1963 by the respondent bank up to the limit of $25,000 and his late father stood surety by charging his lands in favour of the respondent. The last entry in the appellant's account was on September 8, 1965 when the appellant paid into the account a sum of $200. Since then the account became dormant. The estate of the father, who had died, was administered by the Official Administrator. On January 31, 1973 a demand for the settlement of the debt was made and the respondent obtained an order for the sale of the charged lands to recover the guaranteed sum of $25,000 and interest. This sum was eventually paid by the Official Administrator.

While the respondent's claim was pending the appellant wrote to the respondent's solicitors requesting postponement of the originating summons brought by the respondent.

The learned trial judge came to the conclusion that the debt was statute-barred but nevertheless gave judgment in favour of the respondent because of the letter written by the appellant. The appellant appealed on the ground that the learned judge should not have taken the letter into consideration as it was not pleaded.

Held: (1) it is settled law that for the purpose of the statute of limitation as regards overdraft the cause of action against the borrower arises everytime an advance is made by the bank and that no demand for repayment is necessary for the accrual of the cause of action, unless there is a term in the overdraft agreement requiring such notice;

(2) by the time the writ was taken out on June 16, 1975 it was three months short of ten years and the suit was thus caught by section 6 of the Limitation Ordinance, 1953;

(3) the letter constituted a new cause of action and should have been pleaded in the Statement of Claim;

(4) as it was not pleaded the appellant was entitled to judgment, because the debt having been statute-barred, the statement of claim disclosed no cause of action.

Cases referred to:-

(1) *Parr's Banking Co. Ltd.* v. *Yates* [1898] 2 Q.B. 460.

(2) *Bian Chiang Bank Bhd.* v. *Kwong Hing Cheong* [1978] 2 M.L.J. 193.
(3) *Bradford Old Bank Ltd.* v. *Sutcliffe* [1918] 2 K.B. 833.
(4) *Mat bin Lim & Anor.* v. *Ho Yut Kam & Anor.* [1967] 1 M.L.J. 13.
(5) *Busch* v. *Stevens* [1962] 1 All E.R. 412, 416.

FEDERAL COURT.

Nayagam for the appellant.

Foo Say Ghee for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): In this appeal the facts are as follows. On October 2, 1963 tne appellant was granted an overdraft facility by the respondent bank up to the limit of $25,000 and his late father on January 21, 1964 stood as surety for him by charging his lands in favour of the respondent as a collateral to the overdraft facility. The last entry in the appellant's account in respect of which the overdraft was granted was on September 8, 1965 when the appellant paid into the account a sum of $200. Since then the account became dormant and by December 26, 1972 the amount of debt together with accumulated interest owed to the respondent stood at $69,250.72. The appellant's father having died, his estate was managed by Official Administrator. On January 3, 1973 Messrs. Foo Say Ghee & Co. a firm of solicitors acting on behalf of the respondent sent a letter to Official Administrator demanding payment of this debt within 14 days, and a similar letter to the appellant. Subsequently as no payments were made by either Official Administrator or the appellant, the respondent applied for and obtained an order from the court by Originating Summons No. 109/1973 to sell the charged lands in order to recover the guaranteed sum of $25,000 and some interest. This sum was finally paid by the Official Administrator on November 13, 1975.

As regards the appellant despite the letter of demand sent to him by the respondent's solicitors on January 3, 1973 he paid nothing to the respondents. However, on January 14, 1974 whilst the Originating Summons No. 109/1973 was pending he wrote a letter exhibit P7 to the respondent's solicitors requesting the postponement of the respondent's originating summons in the following terms: —

"Re: In the High Court in Malaya at Kota Bharu Originating Summons No. 109/1973 Oversea-Chinese Banking Corpn. Ltd.

1. The Official Administrator, Malaya (as the administrator of the estate of Wee Sidk Hor, deceased)
2. Wee Choo Luan @ Wee Chui Luan
3. Wee Choo Hong @ Wee Chui Hong
4. Philip Wee Kee Puan @ Wee Kee Phuan
5. Teh Eng Bee @ Tay Eng Bee

I am one of the respondent abovenamed. I write to request for a postponement of the application to a date sometime in the middle of March 1974 so as to enable me to raise as initial payment to O.C.B.C. Ltd., Kota Bharu a sum of about $25,000 from the sale of a rubber estate amounting to about 29 acres. I hope to arrange to sell the property comprised in the charge and from the proceeds thereof the official administrator will be able to pay the balance owing to O.C.B.C. Ltd. I shall be able to disclose to the court at the next date of hearing as to whether the sale of the property could be finalized.

Yours faithfully,
Sd. xxx"

As no payment was forthcoming from the appellant, on June 16, 1975 the respondent took out a writ against the appellant claiming the balance of the debt amounting to $44,250.72. In his defence the appellant claimed that the debt in so far as he is concerned, was statute-barred. In the trial during the course of re-examination of the appellant the respondent's counsel produced exhibit P7. Counsel for the appellant made no objection to its admissibility. The learned judge in his judgment examined the law relating to overdraft and came to the conclusion that the debt was statute-barred, but nevertheless gave judgment in favour of the respondent because of exhibit P7. The appellant now appeals to us on the ground that the learned judge should not have taken into consideration exhibit P7 as this document was nowhere pleaded on the respondent's statement of claim.

It is settled law that for the purpose of the statute of limitation as regards overdraft the cause of action against the borrower arises everytime an advance is made by the bank and that no demand for repayment of debt is necessary for the accrual of the cause of action, unless there is a term in the overdraft agreement requiring such notice — *Parr's Banking Co. Ltd.* v. *Yates,*[1] *Bian Chiang Bank Bhd.* v. *Kwong Hing Cheong.*[2] On the other hand the cause of action against a person who stood as a surety for an overdraft facility only accrues when a demand for repayment is made to the surety. *Bradford Old Bank Ltd.* v. *Sutcliffe.*[3] In the present appeal the account became dormant on September 8, 1965, and therefore time for the purpose of limitation began to run from that date. By the time writ was taken out on June 16, 1975 it is three months short of ten years, and the suit is thus caught by section 6 of the Limitation Ordinance 1953. The learned judge, however gave judgment for the respondent because of the exhibit P7.

Counsel for the appellant submitted that exhibit P7 constitutes a new cause of action and that unless it is pleaded in the statement of claim, the appellant should be entitled to the judgment, because the debt having been statute-barred the statement of claim therefore discloses no cause of action. This submission, in our view, is well founded. The point was dealt with by Raja Azlan Shah J. as he then was in *Mat bin Lim & Anor.* v. *Ho Yut Kam & Anor.*[4] and we accept this judgment as a correct statement of the law relating to the pleading and judgment on the statute of limitation. See also *Busch* v. *Stevens,*[5] *per* Lawton J. at p. 416. The respondent's stand in the trial seems to be that the debt was not statute-barred, and that even if it was so barred, the debt was revived by document exhibit P7. Such alternative cause of action must in our view be pleaded in the statement of claim. As this was not done, the statement of claim therefore discloses no cause of action and the suit should be dismissed.

We therefore allow the appeal with costs and the deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Nayagam & Co.; Foo Say Ghee & Co.*